NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SECURED FINANCINGS, LLC,	
Plaintiff and Respondent,	E069148
v.	(Super.Ct.No. PSC1704483)
BRISTOL HOLDINGS, LLC,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. James T. Latting, Judge. Reversed.

Saied Kashani for Defendant and Appellant.

Elevation Law and Christian N. Brown; Law Offices of Peter J. Crosby and Peter J. Crosby for Plaintiff and Respondent.

Daniel Leigh is a principal in both Bristol Holdings, LLC (Bristol) and Tahquitz 41, LLC (Tahquitz).

Secured Financings, LLC (Secured) made a loan to Tahquitz for the purchase and the development of land in Palm Springs and took back a trust deed. Meanwhile, First

Bank made a construction loan to Tahquitz and took back a later-recorded trust deed. Secured and Tahquitz, however, entered into a subordination agreement that reversed these priorities, making First Bank's trust deed senior and Secured's trust deed junior. Leigh personally guaranteed First Bank's senior loan, but not (except in a limited way) Secured's junior loan.

When the project ran into trouble and First Bank was poised to foreclose, Bristol swooped in; it bought out First Bank's construction loan, then released Leigh's guaranty, purportedly in exchange for a payment of $25,000.

This bought some time. About a year and a half later, however, the development was still in trouble, and Bristol started foreclosure proceedings.

Each side accuses the other of carrying out a wily "scheme."

According to Secured, Bristol's scheme was to protect Leigh, as otherwise, Secured could have bought out the senior loan and enforced Leigh's guaranty. It also argues that the release of Leigh's guaranty lessened his incentive to make the development successful.

According to Bristol, Secured's scheme was "to collect twice": it intended to buy out the construction loan and, rather than foreclose, to keep the senior lien in place while forcing Leigh to pay under his guaranty.[1]

[1] At the same time, however, Bristol claims this scheme would not have worked, because, once Leigh paid off the construction loan, he would have become subrogated to the senior lien. Secured responds that Leigh had waived his right to subrogation. We need not resolve this dispute.

Secured filed this action against Bristol, Tahquitz, Leigh, and others, seeking to enjoin the foreclosure. The trial court granted a preliminary injunction. It ruled that Bristol's release of Leigh's guaranty had prejudiced Secured, and therefore Secured was entitled to relief under *Gluskin v. Atlantic Savings & Loan Assn.* (1973) 32 Cal.App.3d 307. As we will explain, *Gluskin* restricts a senior lender's ability to modify its loan in a way that prejudices a subordinated junior lender, at least under some circumstances.

Bristol appeals. We will reverse. We will hold that, in the subordination agreement, as a matter of law, Secured contractually consented to the release of Leigh's guaranty and thus waived its rights under *Gluskin*.

I

FACTUAL BACKGROUND

The following facts are taken from the declarations submitted in support of and in opposition to the motion for a preliminary injunction.

A. *The Releasee of the Guaranty*.

Tahquitz planned to build 41 residential units on 7.6 acres of land in Palm Springs. It obtained a $2 million purchase-money loan[2] from Secured, secured by the property. This was a shared appreciation loan — i.e., in addition to repayment of its loan, Secured was entitled to a sliding share (but not less than half) of the net proceeds of the property.

[2] We call it a "purchase-money loan" because the property was indeed purchased using the proceeds of this loan. However, the stated purpose of this loan was not only the acquisition, but also the development and construction of the property.

Tahquitz then obtained a construction loan of up to $7,290,000 from First Bank, also secured by the property. Leigh personally guaranteed the First Bank loan. Leigh also personally guaranteed the Secured loan, but only under limited circumstances that were never triggered. As discussed in more detail in part I.B, *post*, Leigh is a principal in both Bristol and Tahquitz.

Secured's trust deed was recorded before First Bank's trust deed. However, as Secured's loan agreement required, Secured, First Bank, and Tahquitz entered into a subordination agreement. It provided that First Bank's trust deed "shall unconditionally be and remain at all times a lien . . . prior and superior to the lien" of Secured's trust deed.

The subordination agreement also provided:

"10. [First Bank] may, without affecting the subordination of the deed of trust [in favor of Secured] to . . . the deed of trust in favor of [First Bank], (i) release or compromise any obligation or provisions of the notes and deed of trust in favor of [First Bank] above referred to and all documents given in connection therewith, . . . or (v) modify, amend, defer, extend, consolidate or supplement any of the original or subsequent Lender Security Documents."

"Lender Security Documents" were defined as including Leigh's guaranty.

The subordination agreement gave Secured the right to buy out the senior loan if it went into default. A representative of Secured testified that it would not have entered into the subordination agreement if Leigh had not guaranteed the senior loan.

In mid-2015, housing prices in the Coachella Valley dropped "dramatic[ally]." "Tahquitz started questioning the viability of the Project." It suspended construction; this constituted a default under the senior loan.

In September 2015, Bristol bought the senior loan from First Bank. It paid $751,383.32, the full amount then due. Just days later, Bristol released Leigh's guaranty, purportedly in exchange for a payment of $25,000.

In October 2015, Leigh notified Secured that the senior loan had been purchased. Initially, on October 2, 2015, he identified the purchaser only as "a third party he had had previous business dealings with." On October 25, 2015, he identified the purchaser specifically as Bristol; however, he still did not disclose the fact that his guaranty had been released.

A year and a half went by, while both sides explored such options as bringing in new investors, selling the property, or developing it for a different purpose. None of these panned out. In April 2017, Bristol started proceedings to foreclose on the senior loan.

In July 2017, Secured inquired about purchasing the senior loan. In its response, Bristol finally disclosed the release of the guaranty.

At the time of the proceedings below, the unpaid balance of the senior loan was $878,563.36. As Secured conceded, the value of the property was "well in excess of" this amount. Thus, if there were a foreclosure, the senior loan would be fully satisfied, and there would be no need for the senior lender to resort to Leigh's guaranty.

B. *Facts Relevant to an Alter Ego Theory.*

Leigh is the manager of Bristol. Bristol, in turn, is the general partner in, and sole owner of, Corman Leigh Housing LLP (Corman). Corman is the manager of Tahquitz.

Bristol and Corman have the same address and the same agent for service of process — namely, DeRicci Keller, Leigh's legal assistant.

Keller testified that Bristol and Tahquitz "are separate and distinct entities." Bristol was created in 2007 — i.e., it was not created for the purpose of buying the senior loan. According to Keller, "Bristol . . . has engaged in multiple other projects and investments and is currently committed to other projects as well." All of the relevant entities, as well as Leigh himself, maintained separate books and records and separate bank accounts.

II

PROCEDURAL BACKGROUND

Secured filed this action on August 17, 2017. At the time, a foreclosure sale was set for August 22, 2017.

The complaint named as defendants Bristol, Tahquitz, Leigh, and Corman.[3] It asserted causes of action for breach of the subordination agreement, breach of the limited guaranty, breach of the implied covenant of good faith and fair dealing, equitable

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[3] Chicago Title Company (Chicago) was also named as a defendant, but it filed a declaration of nonmonetary status. This meant that it disclaimed any involvement in the action, other than as trustee under the deed of trust, and it agreed to be bound by any judgment. (Civ. Code, § 2924*l*.)

subordination, equitable recharacterization,[4] intentional misrepresentation, intentional concealment, merger of liens, and declaratory relief.

Secured then filed an ex parte application for a temporary restraining order and for an order to show cause regarding a preliminary injunction enjoining the foreclosure. Bristol filed an opposition to the ex parte application. The trial court granted a temporary restraining order and issued an order to show cause. Bristol then filed an opposition to the request for a preliminary injunction.

After hearing argument, the trial court granted the requested preliminary injunction. It ruled:

"The financial harm to Secured from the loss of the Guaranty is obvious: it eliminated an additional source of funds that would have been available to help avoid a default, or avoid a deficiency in the event of . . . default. [It] removed any incentive for Leigh to ensure that Tahquitz . . . carried on the project and met its commitments. . . . [¶] . . .

"The situation here is analogous to that in *Gluskin v. Atlantic Savings & Loan Ass'n* (1973) 32 Cal.App.3d 307[,] where the court held that public policy considerations warrant protecting the rights of a subordinating seller (or other first-in-time lender) who willingly agrees to take a junior position in reliance on the fact that the proceeds of the

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4 This cause of action sought to recharacterize Bristol's purchase of the senior loan as full payment of the loan.

subsequent loan (to which it has agreed to subordinate) will be used to enhance the value of the property . . . . [Citations.]

"The same policy reasons should protect a subordinated lender from the apparent agreement here between Tahquitz and Bristol that Leigh would not really guaranty the loan because that agreement is against Secured's interest."

Bristol filed a timely notice of appeal. The parties stipulated to stay the trial court proceedings pending appeal.

III

PARTIES TO THE APPEAL

The preliminary injunction prohibited Bristol, Leigh, and Chicago from proceeding with a foreclosure of the property. Bristol appealed; Leigh did not.[5]

"Where only one of several parties appeals from a judgment, the appeal includes only that portion of the judgment adverse to the appealing party's interest, and the judgment is considered final as to the nonappealing parties. [Citations.]" (*City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 678.) Under this rule, it might appear that, even if we were to reverse, we could not give Bristol effective relief, because Leigh would remain enjoined.

"The general rule," however, "is subject to an important exception: Where the part of the judgment appealed from is so interwoven and connected with the remainder

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[5] Chicago, too, did not appeal. Arguably, under Civil Code section 2924*l*, its participation is not required. (See fn. 3, *ante*.) In any event, everything we say about Leigh in this section of our opinion would apply equally to Chicago.

that the appeal from a part of it involves consideration of the whole, such that if a reversal is ordered, it should extend to the entire judgment. [Citation.]" (*City of Riverside v. Horspool*, *supra*, 223 Cal.App.4th at pp. 678-679.)

Here, the injunction against Bristol is inextricably interwoven with the injunction against Leigh. It was either proper as to both of them, or neither. Moreover, it is Bristol, as the secured party, that has the right (or not) to foreclose; if Leigh were involved in a foreclosure at all, he would be acting on behalf of Bristol.

We therefore conclude that we can review the injunction in its entirety.

IV

STANDARD OF REVIEW

"We review an order granting a preliminary injunction under an abuse of discretion standard. [Citations.] Review is confined, in other words, to a consideration whether the trial court abused its discretion in '"evaluat[ing] two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued."' [Citation.]" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.)[6]

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6 Bristol contends that the trial court erred in evaluating the balance of harms, because the release of the guaranty did not actually harm Secured; if the guaranty had remained in place, Tahquitz still would have defaulted, Leigh would have paid off the senior loan and thus become subrogated, and Leigh would have foreclosed. In

“‘Notwithstanding the applicability of the abuse of discretion standard of review, the specific determinations underlying the superior court’s decision are subject to appellate scrutiny under the standard of review appropriate to that type of determination. [Citation.] For instance, the superior court’s express and implied findings of fact are accepted by appellate courts if supported by substantial evidence, and the superior court’s conclusions on issues of pure law are subject to independent review.’ [Citation.]” (*ITV Gurney Holding v. Gurney* (2017) 18 Cal.App.5th 22, 29.)

V

GLUSKIN: THE DUTY OF A SENIOR LIENHOLDER

NOT TO PREJUDICE A SUBORDINATED JUNIOR LIENHOLDER

Bristol contends that the trial court erred by applying *Gluskin* under the circumstances here, so we discuss it in some detail. Our discussion of *Gluskin* is also helpful as background for our consideration of whether Secured waived its rights under *Gluskin*.

In *Gluskin*, a seller sold land to a developer and carried back a loan for the purchase price. (*Gluskin v. Atlantic Savings & Loan Assn.*, *supra*, 32 Cal.App.3d at p. 310.) The developer also obtained a construction loan. (*Id*. at pp. 309, 311.) The seller agreed to subordinate its lien to the construction lender’s lien. (*Id*. at pp. 310, 311 & fn. 3.)

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response, Secured repeats its argument (see fn. 1, *ante*), that Leigh had waived his right to subrogation. As already noted, we do not decide this issue.

When the development ran into difficulty, the construction lender and the developer agreed to modify the construction loan by reducing the principal amount, raising the interest rate, and — most significantly — changing the maturity from 30 years to just 10 months, with a balloon payment. (*Gluskin v. Atlantic Savings & Loan Assn.*, *supra*, 32 Cal.App.3d at pp. 311-312.) Eventually, the developer defaulted anyway. The construction lender foreclosed and bought in the property at the foreclosure sale. (*Id*. at p. 312.)

The seller claimed it had been prejudiced by the modification, because it allowed the construction lender to obtain the property without having to pay the seller. (*Gluskin v. Atlantic Savings & Loan Assn.*, *supra*, 32 Cal.App.3d at p. 312.) It sued for a declaration that its lien be given priority over the construction lender's lien. (*Id*. at p. 309.) The trial court found for the construction lender, in part because it found that the subordination agreement was unconditional, and in part because it found that the seller had not been prejudiced by the modification. (*Id*. at p. 312, & fn. 5.)

The appellate court reversed; it held that the trial court's decision was "based on several erroneous premises of law . . . ." (*Gluskin v. Atlantic Savings & Loan Assn.*, *supra*, 32 Cal.App.3d at p. 318.)

It began by stating, "We recognize the vulnerable position in which a seller who agrees to subordinate his purchase money deed of trust may find himself." (*Gluskin v.*

Atlantic Savings & Loan Assn., *supra*, 32 Cal.App.3d at p. 313.) Based on earlier cases,[7] it descried a "public policy which requires protection of subordinating sellers . . . ." (*Id.* at p. 314.) It therefore "h[e]ld . . . that a lender and a borrower may not bilaterally make a material modification in the loan to which the seller has subordinated, without the knowledge and consent of the seller to that modification, if the modification materially affects the seller's rights." (*Id.* at p. 314.)

It explained: "The risk that the buyer-borrower will default in its obligation to the lender and that a foreclosure by the lender will follow is, of course, the very hazard to which a subordinating seller exposes himself by reason of a subordination agreement. In the abstract, there is no obligation on a lender to protect a subordinating seller from this risk. . . . But this is not to say that a lender and a buyer can enter into an agreement or a course of conduct between themselves whose result is to destroy a seller's interest. Such an agreement or conduct if deliberately undertaken would entitle the seller, depending upon the facts of the case, to secure relief either upon the ground of fraud or pursuant to

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[7] *Handy v. Gordon* (1967) 65 Cal.2d 578 [seller's agreement to subordinate was not sufficiently "just and reasonable" as to support specific performance because it contained no terms minimizing risk that subordinating lenders would destroy seller's security]; *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023 [subordinated seller had cause of action for breach of construction lender's duty to protect subordinated seller's security interest by supervising disbursement of loan funds]. (See *Gluskin v. Atlantic Savings & Loan Assn., supra*, 32 Cal.App.3d at pp. 313-314.)

the requirement of fair dealing inherent in all contracts . . . ." (*Gluskin v. Atlantic Savings & Loan Assn., supra*, 32 Cal.App.3d at p. 315.)[8]

The court concluded that the trial court erred by finding that the subordination was unconditional; "[t]he possibility of liability in the event of improper conduct must always condition the lender's priority." (*Gluskin v. Atlantic Savings & Loan Assn., supra*, 32 Cal.App.3d at p. 315, fn. 8.)

Finally, it also rejected the trial court's finding that the seller had not been prejudiced by the modification. (*Gluskin v. Atlantic Savings & Loan Assn., supra*, 32 Cal.App.3d at p. 318, fn. 11.) It acknowledged the possibility that the developer "would have defaulted anyway," but it added: "Be that as it may, it was the modified agreement that was foreclosed and it is this foreclosure which, under the trial court's reasoning, has caused [the construction lender] to cut off [the seller]'s rights in the property. [The seller] therefore has been prejudiced by the modification." (*Ibid*.)

Gluskin and the earlier cases on which it relied all involved a subordinating *seller*. Moreover, *Gluskin* expressly reasoned from "the vulnerable position" of a subordinating seller (*Gluskin v. Atlantic Savings & Loan Assn., supra*, 32 Cal.App.3d at p. 313) and the concomitant "public policy which requires protection of subordinating sellers . . . ." (*Id*. at p. 314.) Bristol therefore argues that *Gluskin* affords relief exclusively to

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[8] Despite these nods to fraud and breach of the implied covenant of good faith and fair dealing, *Gluskin* is, to some extent, a result in search of a theory. Arguably, it is best viewed as based on the failure of an implied condition precedent. (See, e.g., *Moorefield Construction, Inc. v. Intervest-Mortgage Investment Co.* (2014) 230 Cal.App.4th 146, 162.)

subordinating sellers; if so, it does not apply here, because Secured is a merely a lender, not a seller.

Subsequent California cases shed little light on this question. Typically, they involved subordinating sellers, so the issue simply did not arise. (E.g., *Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 621; *Resolution Trust Corp. v. BVS Dev.* (9th Cir. 1994) 42 F.3d 1206, 1209-1210, 1215 [applying California law].)

Lennar v Northeast Partners v. Buice (1996) 49 Cal.App.4th 1576, however, did not involve a subordinating seller. Rather, it involved "two hard money lenders . . . ." (*Id*. at p. 1587.) Pursuant to a subordination agreement, a trust was the senior lienholder, and Lennar was the junior lienholder. (*Id*. at pp. 1580-1581.) The trust and the borrower agreed to amend the senior loan by advancing additional funds, changing the interest rate, and extending the maturity date. (*Id*. at pp. 1579-1581.)

The appellate court held that modifications were material and "adversely affected Lennar's rights as a junior lienholder." (*Lennar v Northeast Partners v. Buice*, *supra*, 49 Cal.App.4th at pp. 1583-1585.) It further held that Lennar was entitled to relief, even though it was not a subordinating seller: "While the court in *Gluskin* . . . addressed the particular situation of a subordinating seller, a leading commentator has suggested that a material modification to any senior lien should result in a loss of priority. 'It is submitted that in any case where the senior lien is modified in any material manner which produces an important impact on the value of the junior lien, the modification should be junior to the second lien, and if that is not practical, the entire senior lien should become junior to the existing second lien.' [Citation.]" (*Id*. at p. 1587.) Finally, it held that the appropriate remedy was not to abrogate the senior's priority entirely, but rather to abrogate it solely with respect to the modification. (*Id*. at pp. 1588-1589.) It explained:

"We need not determine whether a material modification to a senior lien may result in a total loss of priority of the senior lien where the lienholders are hard money lenders. The equities in this case do not require such a result. Here, the impairment to Lennar's security and its rights as a junior lienholder caused by the modification can be fully eliminated by denying priority to the modification. Unlike in *Gluskin*, . . . the modification had no effect on the value of the underlying security. Denying priority only to the modification restores Lennar to the same position as before: the position it bargained for by agreeing to accept a second lien on the property as security for its loan." (*Id*. at p. 1588.) It added, "When the junior lienholder is a subordinating seller, equity may require a different result." (*Ibid*.)

In sum, *Lennar* held that a subordinating nonseller was entitled to at least some relief. Thus, it refutes Bristol's contention that relief under *Gluskin* is available exclusively to subordinating sellers.[9]

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[9] It is hard to say how *Lennar*'s approach of denying priority only to the modification would work here. Bristol contends it would have no effect, because Secured was not really harmed by the release of the guaranty. Secured contends that it would still be entitled to "[a] total reversal of priority," because that would be the only way to eliminate the effect of the release of the guaranty. A plausible third view is that Bristol (and Leigh) would have to choose between reinstating the guaranty and being subordinated.

Bristol relies on *Friery v. Sutter Buttes Sav. Bank* (1998) 61 Cal.App.4th 869. There, Sutter Buttes held a senior trust deed. (*Id*. at pp. 871-872.) Friery bought the property, then sold it to a new buyer named Briones and took back a junior trust deed. (*Id*. at p. 872.) Crucially, the sale to Briones triggered a due-on-sale clause in Sutter Buttes' loan. (*Ibid*.) Sutter Buttes and Briones entered into an agreement allowing Briones to assume the loan; the agreement also modified the loan by shortening the maturity and requiring additional security. (*Ibid*.)

The appellate court declined to decide whether the modification was material. (*Friery v. Sutter Buttes Sav. Bank*, *supra*, 61 Cal.App.4th at p. 880.) It held, however, that even if it was, Friery was not entitled to relief. (*Ibid*.)

It explained that the case did not present the same "policy considerations" as *Gluskin*: "Friery subordinated to no one. A sophisticated loan broker, she took a calculated investment risk. . . . Friery . . . knew or should have known that selling it to a third party without [Sutter Buttes'] consent would trigger the due on sale clause, as indeed it did. Sutter Buttes responded by renegotiating the terms of the note with the borrowers to protect its security. It undertook no express or implied contractual duties toward Friery and stood in no special relationship to her. On the contrary, Friery's relationship to the bank was nothing more than that of a competing lienholder on the same property." (*Friery v. Sutter Buttes Sav. Bank, supra,* 61 Cal.App.4th at pp. 877-878.)

The court cautioned that “applying *Gluskin* in . . . a sweeping fashion might upset established rules of lien priorities and foster uncertainty and instability in the lending market . . . .” (*Friery v. Sutter Buttes Sav. Bank*, *supra*, 61 Cal.App.4th at p. 878.) “A seller who invests in a second deed of trust accepts all the risks of the junior position. She gambles that the equity in the property will be sufficient to cover her investment in a worst case scenario — a foreclosure sale. Where, as here, she sells the property without accommodating the senior lienholder, she takes the risk the anvil will fall — the senior will ‘call’ the loan and demand full payment, or require the new buyer to assume the loan on terms which enhance the value of the lender’s security position. The senior has a ‘valid and enforceable privilege’ of accelerating the note upon transfer of title. [Citation.] It would defy logic to conclude that taking the lesser step of renegotiating the loan to protect its lien may subject the senior to the loss of priority unless the junior ‘consents’ to it. Absent facts giving rise to a special relationship between the senior and the junior, such a rule would amount to the ‘tail wagging the dog.’” (*Ibid*., fn. omitted.)

Thus, *Friery* merely held that the *particular* nonseller lender in the case before it was not entitled to relief, because she knowingly (or at least negligently) assumed the risk that the senior lender and the borrower would enter into a modification that would impair her rights. It did *not* hold that a nonseller lender can *never* be entitled to relief. Indeed, it implied that a nonseller lender *could* be entitled to relief, especially when there is a subordination agreement.

We also note that the Third Restatement of Property would extend *Gluskin* to all junior lenders, not just sellers (and not just when there is a subordination agreement). It provides: "If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests . . . ." (Rest.3d Property, Mortgages, § 7.3(b), p. 473; see also *id*., § 7.7, com. c; Lilly, *Subrogation of Mortgages in California: A Comparison with the Restatement and Proposals for Change* (2001) 48 UCLA L. Rev. 1633, 1649 ["California . . . should adopt the Restatement approach . . . ."].)

We therefore conclude that the mere fact that Secured was not a seller did not make it error to apply *Gluskin* here.

VI

CONTRACTUAL CONSENT TO THE RELEASE OF THE GUARANTY

Alternatively, Bristol contends that, in the subordination agreement, Secured waived its rights under *Gluskin*.

A junior lender can consent by contract to forgo its rights under *Gluskin*. (See *Swiss Property Management Co., Inc. v. Southern California IBEW-NECA Pension Plan* (1997) 60 Cal.App.4th 839, 844-846, 849-850; see also *Gluskin v. Atlantic Savings & Loan Assn.*, *supra*, 32 Cal.App.3d at p. 314 [subordinating seller may consent to modification of senior loan].)

"When an appellant challenges a trial court's interpretation of a written contract, the substantial evidence standard of review applies when the contract is ambiguous and conflicting extrinsic evidence is admitted to assist the court in interpreting the contract. [Citation.] However, if interpretation of the contract does not turn on the credibility of conflicting extrinsic evidence, the trial court's interpretation of the contract is a question of law we review de novo, or independently. [Citations.]" (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1110.)

Here, the only extrinsic evidence proffered was that "Secured . . . would not have agreed to subordinate its lien rights without a guaranty of the Construction Loan." However, there was no evidence that Secured ever told this to the other parties before entering into the subordination agreement. "'[E]vidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language.' [Citation.]" (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1159.)

We therefore construe the subordination agreement de novo.

A. *Clause 10(i): Consent to "Release or Compromise All Documents Given."*

Clause 10(i) of the subordination agreement expressly allowed First Bank (and Bristol, as its successor and assign) to "release or compromise any obligation or provisions of the notes and deed of trust . . . *and all documents given in connection therewith* . . . ." (Italics added.) Leigh's guaranty was a "document given in connection" with the senior loan notes and trust deed. Thus, Bristol's release of his guaranty was within the scope of this consent.

1. *Secured's argument regarding "and."*

Secured, however, focuses on the word "and" — it argues that that the lender is allowed to release other "documents" only if it simultaneously releases "the notes and trust deed." This interpretation is untenable, for three reasons.

First, it is grammatically incorrect. "May" is a grant of permission, not a requirement. Thus, saying that someone "may" do A "and" B allows them to do (1) neither A nor B, (2) A but not B, (3) B but not A, or (4) both A and B. For example, if a mother tells her son, "After you finish your homework, you may play Fortnite and Minecraft," no one would suppose she means he *cannot* play Fortnite unless he *also* plays Minecraft.[10]

Second, the first part of the clause allows the lender to release "*any obligation or provisions* of the notes and deed of trust . . . ." (Italics added.) Thus, the lender is not required to release the notes and trust deed in their entirety. For example, it can choose to release just the obligation to pay on the first of the month and to accept a late payment instead. Or it can choose to release just its right to demand arbitration (and, in fact,

10 In its brief, Secured claimed that the use of the word "and" made it "clear" that the lender could not release the guaranty alone. At oral argument, it backpedaled, claiming only that the word "and" was ambiguous and thus at least susceptible of this interpretation. On this record, we do not consider it to be ambiguous. However, we do not mean to bar Secured from introducing extrinsic evidence of ambiguity on remand. (See *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37.)

Bristol has waived arbitration). It would be absurd to suppose that it cannot release any such "obligation" or "provision" unless it also releases "all documents in connection therewith" at the same time.

Third, the manifest intent of paragraph 10, taken as a whole, is to allow the lender to take actions that Secured might otherwise claim to be prejudicial. Thus, clause 10(ii) allows the lender to "release the security interest in, or surrender, release or permit any substitution or exchange of all or any part of any properties securing repayment of said notes . . . ." Clause 10(iv) allows the lender to "provide additional advances to [Tahquitz] in connection with the property . . . and secured thereby . . . ." At the risk of being reductive, it is chock-full of "any's" and "and's."

Paragraph 13 then puts boundaries around the breadth of Paragraph 10. It provides that, "[n]otwithstanding any other provision of this Agreement to the contrary," the lender could not (without Secured's consent) increase the amount of the loan above a certain threshold, shorten the maturity date, increase the interest rate, or shorten any notice and cure period. If the parties really intended to prohibit Bristol from releasing the guaranty without also releasing the note, one would expect to find that provision here (and stated more explicitly).

2. *Secured's argument regarding "given in connection with."*

Secured also argues that the guaranty is not a "document given in connection with" the notes and the trust deed.

First, it points out that "Lender Security Documents" is a defined term that includes the guaranty.[11] It argues: "If the parties truly intended to allow an outright release of [the g]uaranty under subsection (i), the language thereof would have explicitly included that document — either by specifically referring to that guaranty or otherwise by specifically referring to the 'Lender Security Documents' . . . ." "Document[s] given in connection with" the notes and trust deed, however, is a broader term than "Lender Security Documents." If it does not at least include them, we are at a loss to know what it does include; certainly Secured does not enlighten us.

Next, Secured claims that "document[s] given in connection with" means "documents *specifically referenced* in the notes and/or deed of trust as being given in connection therewith." (Original italics.) The simple answer is — no, it doesn't. Indeed, it would be unusual for either a note or a trust deed to list the other documents given in connection with the overall transaction. Notes and trust deeds are meant to stand alone, so as to be independently transferable and recordable.

Finally, Secured argues that, in context, "document[s] given in connection with" the notes and trust deed are limited to documents given by *Tahquitz*. We find no support

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11 Specifically, "Lender Loan Documents" is defined as the construction loan agreement, the notes, the trust deed, "various assignments, [an] environmental indemnity agreement, and other collateral security documents . . . ."

"Lender Security Documents" is then defined as the "Lender Loan Documents," plus guaranties and the environmental indemnity agreement.

for this reading. Paragraph 10 does not mention either Tahquitz or the "Owner" (except that clause 10(iv) allows the lender to "provide additional advances to Owner").

B. *Clause 10(v): Consent to "Modify, Amend,* [or] *Defer" the Guaranty*.

Separately and alternatively, clause 10(v) allows the lender to "modify, amend, defer, extend, consolidate or supplement" the guaranty. Bristol's release of the guaranty was also within the scope of this consent.

Secured argues that a release is not a "modif[ication]" or "amend[ment]." Under clause 10(v), however, the lender could "defer" the guaranty, from year to year until doomsday. It could also "modify" or "amend" the guaranty so as to cap it at $1. In fact, Bristol actually "released" the guaranty in exchange for a $25,000 payment, which looks more like a modification than a complete release of liability.[12]

We therefore conclude that Secured consented contractually, in advance, to the release of Leigh's guaranty.

VII

ALTER EGO

Secured contends that, assuming the trial court's reasons for granting the preliminary injunction were erroneous, we should uphold the injunction on alter ego grounds. It argues that, because Leigh used Bristol and Tahquitz "to carry out an

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[12] Secured also argues that, because clause 10(i) includes the word "compromise," but clause 10(v) does not, the lender could not compromise the guaranty alone (i.e., without also compromising the notes and trust deed.) But surely any "compromise" of the guaranty would also constitute a "modification" and/or an "amendment." This just goes to show how strained Secured's overall argument really is.

inequitable scheme," Bristol and Tahquitz should be treated as a single entity. Thus, when Bristol purchased the construction loan, there was a merger of the equitable title and the legal title, which extinguished the trust deed.

The trial court did not rule on the alter ego issue. Thus, if this contention is even potentially meritorious, we would have to remand with directions to make the relevant findings. We conclude, however, that it is not, for two reasons.

A. *Alter Ego*.

"Two requirements must be met to invoke the alter ego doctrine: (1) '[T]here must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist'; and (2) 'there must be an *inequitable result* if the acts in question are treated as those of the corporation alone.' [Citation.]" (*Turman v. Superior Court* (2017) 17 Cal.App.5th 969, 980-981.)

We may assume, without deciding, that the record here is sufficient to show the necessary unity of interest. However, there is no inequitable result. As we held in part V, *ante*, Bristol had the contractual right, under the subordination agreement, to release Leigh's guaranty.

B. *Merger*.

Even if there were alter ego relationship, there would be no merger. "A merger does not always follow the union of a greater and lesser estate in the same ownership.

The question is one of intention, actual or presumed, of the person in whom the interests are united . . . ." (*Ito v. Schiller* (1931) 213 Cal. 632, 635.)

"It is true that, under ordinary circumstances, where the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee, and the mortgage is extinguished. . . . But this rule is never applied where there is an intervening lien on the property, which it is to the interest of the purchaser to keep on foot, and where there is no evidence, direct or circumstantial, of an express intention to extinguish the first mortgage and hold subject only to the second. In such a case the legal title and first-mortgage lien will be considered as separate interests whenever necessary for the protection of the just rights of the purchaser." (*Anglo-Californian Bank v. Field* (1905) 146 Cal. 644, 653.)

Here, even assuming Bristol and Tahquitz should be deemed to be the same entity, that entity never intended there to be a merger. Quite the contrary, it intended to keep the senior lien in place, so it could foreclose and get its money back. As Bristol points out, applying merger here would mean "the $750,000 or so Bristol paid to acquire the [senior loan] would all go to the exclusive benefit of the junior lienholder . . . ." Plainly, this was never Bristol's nor Tahquitz's intent.

VIII

DISPOSITION

The order granting a preliminary injunction is reversed, the preliminary injunction is dissolved, and the matter is remanded for further proceedings not inconsistent with this opinion. Bristol is awarded costs on appeal against Secured.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.